No. 88-194

Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHARLES T. WEAVER,
GERALDINE WEAVER,
KENTUCKY RIVER DEVELOPMENT CORPORATION, and
C. T. & G., INC., - - - - - - - Petitioners

versus

ANDERSON COUNTY FISCAL COURT,
ANDERSON COUNTY PLANNING AND ZONING COMMISSION, and
ANDERSON COUNTY BOARD OF ADJUSTMENTS, - - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a person who states a claim for a substantive due process violation under the Due Process Clause of the Constitution of the United States in a Title 42 USC, Section 1983 civil rights action is required to avail himself of available state remedies by bringing an inverse condemnation action in state court before filing suit in federal court under Section 1983.

(2) Whether a person who states a claim for a substantive due process violation under Title 42 USC, Section 1983 and who has acquired a "vested right" under Kentucky law to complete the development of his property, must first seek a "variance" from the application of a subsequently enacted zoning ordinance, even though his use of the property constitutes a lawful, pre-existing use, and even though variances under Kentucky law are limited to "dimensional variances" and may not be used to effect a re-zoning of the property.

(3) Whether the three-judge panel of the Sixth Circuit Court of Appeals erred in finding that the plaintiffs could have sought a variance from the zoning regulations, where the procedure available for obtaining a variance from the zoning regulations under Kentucky law only applied to "dimensional variances," and may not be used to effect a re-zoning of the property.

(4) Whether the unappealed decision of the Anderson County Board of Adjustments constituted a final and judicially reviewable decision under Kentucky law regarding the application of the zoning ordinance to the plaintiffs' development.

PARTIES TO THE PROCEEDING

The caption of the case in this Court names all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit. The corporate petitioners, Kentucky River Development Corporation and C. T. & G., Inc., both Kentucky corporations, have no parent corporations, subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

CHARLES T. WEAVER, GERALDINE WEAVER, KENTUCKY RIVER DEVELOPMENT CORPORATION, AND C. T. & G., INC., the petitioners herein, pray that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on February 11, 1988.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto. The opinion of the United States District Court, Eastern District of Kentucky, is reported at 648 F. Supp. 1575 (1986), and is printed in Appendix B hereto.

JURISDICTION

The judgment of United States Court of Appeals for the Sixth Circuit was entered on February 11, 1988. A timely petition for rehearing en banc was denied on April 15, 1988 (Appendix A, *infra*). The jurisdiction of the Supreme Court of the United States is invoked under 28 USC, Sections 1254 and 2101.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, Constitution of the United States:

"No person shall be . . . . deprived of life, liberty, or property, without due process of law . . ."

Fourteenth Amendment, Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

STATUTES INVOLVED

Title 42, United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Kentucky Revised Statutes, Section 100.111(7):

"Dimensional variance" means a departure from the terms of the zoning regulation pertaining to height or width of structures and size of yards and open spaces. . . ."

Kentucky Revised Statutes, Section 100.347:

"(1) Any person or entity claiming to be injured or aggrieved by any final action of the . . . board of adjustments may appeal from the action to the circuit court of the county in which the land lies. Such appeal shall be taken within thirty (30) days after the final action of the . . . board.

(2) All appeals shall be taken in the appropriate circuit court within thirty (30) days after the action or decision of the . . . board of adjustments and all decisions which have not been appealed within thirty (30) days shall become final . . . ."

STATEMENT OF THE CASE

This is a civil rights action brought by the plaintiffs under 42 U.S.C. Section 1983 against the zoning authorities of Anderson County, Kentucky, in response to the defendants' issuance of cease and desist orders in November 1985, prohibiting the plaintiffs from further development of a mobile home park and an adjoining sales lot.

The plaintiffs (sometimes referred to herein as the "Weavers") are the owners of a tract of land situated in both Anderson and Franklin Counties, Kentucky. They had planned to develop this land into a mobile home park and an adjoining sales lot. At the time they began development of the park, there was no zoning ordinance in effect in Anderson County. The plaintiffs obtained a construction permit from the State Health Department in Kentucky, which has jurisdiction over mobile home parks, and moved ahead with their development plans. Prior to the adoption of a zoning ordinance in Anderson County, the Weavers had made substantial expenditures and incurred substantial obligations in planning and developing this project.

In March 1985, the plaintiffs had applied for and obtained a permit from the state to construct 340 lots in the mobile home park, in accordance with a surveyed plat submitted with the application. They began construction in April 1985, and proceeded with the development without interruption until their financing was jeopardized by the efforts of the Anderson County zoning authorities to stop them.

Although the amount expended or incurred by the plaintiffs in furtherance of the development is disputed, construction of the project was well underway before Anderson County adopted a zoning ordinance effective September 1, 1985, and took action to stop the development. The defendants have admitted that the plaintiffs expended incurred at least $40,000 in furtherance of the project, and have admitted that the zoning ordinance was adopted in response to the plaintiffs' development. (Appendix C, pages 21a and 22a).

Shortly after Anderson County adopted county-wide zoning, the zoning enforcement officer issued cease and desist orders against the plaintiffs prohibiting any further development on the basis that the plaintiffs were in violation of the new zoning ordinance, which zoned the land for agricultural uses. The cease and desist orders prohibited the plaintiffs from any further development of the land as a mobile home park.

In response to Anderson County's issuance of the cease and desist orders, the Weavers filed this civil rights action under 42 USC Section 1983. In addition to filing this civil rights action, the Weavers also filed an appeal and motion to dismiss the cease and desist orders with the Anderson County Board of Adjustments (the "board of adjustments" or the "board") solely for the purpose of preserving their right of appeal and to contest the jurisdiction and the legal authority of the board of adjustments over their development.

The plaintiffs secured a preliminary injunction from the United States District Court, Eastern District

of Kentucky, enjoining the defendants from interfering with their construction pending a review of the action by the District Court on the merits. The Court's review of the merits of the case required a determination of whether the plaintiffs has acquired a vested property right under Kentucky law to complete their development of the project, regardless of the subsequent enactment of the ordinance.

Upon entering the preliminary injunction, however, the District Court advised all parties that it would be appropriate for the board of adjustments to hold a hearing and make findings on the issue of the plaintiffs' vested right, since the federal action had been filed prior to any hearing before the board of adjustments. A trial type hearing was held in two sessions before the board of adjustments subsequent to the District Court's issuance of the preliminary injunction. The board found that the plaintiffs had the vested right to complete only 70 of the 340 lots of the project. The board made it's ruling based on it's theory that it considered these lots to be "Phase I," of the development and considered the lot in separate phases. (Appendix C, at page 23a). The transcripts of those hearings were filed with the District Court. The Weavers did not appeal the ruling of the board of adjustments to the state circuit court. Rather, they returned to the District Court and requested permanent injunctive relief on their vested rights theory.

The District Court carefully reviewed the transcripts and held that the board's findings were totally at variance with the uncontradicted evidence in the

case, which shows that the plaintiffs had proceeded from the beginning to construct the project as a whole. It was only as an afterthought that the board adopted it's "Phase 1" theory and attempted to limit the plaintiffs' development to 70 lots.

Both sides moved for a summary judgment in this civil rights action. The United States District Court found that Kentucky law is clear that once the plaintiffs had expended substantial sums in furtherance of their mobile home park project prior to the enactment of the zoning ordinance, they acquired a property right, vested under Kentucky law, to complete the project as planned. The District Court found that the records in this case established that the plaintiffs began construction of the mobile home park and sales lot as a single project, and that it was only as an afterthought that the board tried to circumvent the plaintiffs vested right by adopting it's "Phase I" theory. The Court specifically noted that the economic viability of the project depends on the revenues that it will produce as a whole, and further the fact that the plaintiffs considered the project as a single viable unit was indicated by the fact that they had secured a permit from the State Health Department to construct the project six months before the enactment of the zoning ordinance. The Court held that under these circumstances, it must be considered as one project which the plaintiffs had clearly commenced.

The United States District Court held that this vested right to complete the development is a property right existing under state law which is protected under

the Fourteenth Amendment to the Constitution of the United States, and that deprivation of this right is a violation of the plaintiffs' substantive due process rights.

The District Court's decision left no doubt that the plaintiffs were entitled to a summary judgment. The Court also found that the unappealed decision of the board of adjustments was not *res judicata* and was not to be given preclusive effect under Kentucky law. The Court entered a summary judgment for the plaintiffs and issued a permanent injunction against the defendants which entitled the plaintiffs to complete the development of their project without further interference from the Anderson County authorities. Only the issue of damages remained pending.

The defendants appealed the decision of the United States District Court to the United States Court of Appeals for the Sixth Circuit. On appeal, the Sixth Circuit ruled that the plaintiffs should have filed a claim for "inverse condemnation" in state court prior to filing their Section 1983 action in federal court and reversed the decision of the District Court with instructions to dismiss the case as prematurely brought. The Court of Appeals also held that the plaintiffs' claims should be dismissed for a lack of ripeness, stating that the plaintiffs did not adequately take advantage of available state remedies, and further ruled that the plaintiffs had failed to obtain a "final decision" regarding the application of the zoning ordinance to their property because they had not sought a "variance"

which supposedly would allow them to continue the development.

The plaintiffs filed a timely petition for rehearing en banc with the United States Court of Appeals. The plaintiffs noted in their petition that their claim was based on a substantive due process violation, and not a violation of procedural due process or on a taking of property without just compensation. The plaintiffs' petition for rehearing en banc pointed out that the Supreme Court of the United States and many of the circuit courts have firmly established the right to bring a claim for a substantive due process violation in a Section 1983 action in federal court without being required to exhaust state judicial or administrative remedies.

Further, the plaintiffs' petition for rehearing en banc illustrated that the Court of Appeals had erroneously assumed that the plaintiffs had not obtained a final decision regarding the application of the zoning ordinance, and erroneously assumed that the plaintiffs' could have obtained a "variance" to complete their development of the project. The plaintiffs' petition to the Sixth Circuit for rehearing clearly established that under Kentucky law the unappealed decision of the board of adjustments was considered a "final" decision and that plaintiffs could not have sought a "variance" from the zoning regulations under Kentucky law, because the procedure available for obtaining a variance from the zoning regulations under Kentucky law applied only to "dimensional variances." The plaintiffs' petition also noted that the plaintiffs' could not have

used a "variance" to effect a re-zoning of the property, which the defendants have, in effect, admitted would be the required procedure under Kentucky law, even assuming that the zoning ordinance applied to the plaintiffs' development.

On April 15, 1988, the Court of Appeals entered an Order stating that no judge of the Court of Appeals had requested a vote on the plaintiffs' motion for a rehearing en banc, and that the petition had therefore been referred to the original three-judge panel, which concluded that the original decision of the case would stand, denying the petition.

The plaintiffs then filed a motion with the Court of Appeals to stay the mandate pending plaintiffs' application for a Writ of Certiorari to the Supreme Court of the United States. The Court of Appeals granted the motion to stay the mandate, and this petition was filed.

REASONS FOR GRANTING WRIT

It is respectfully submitted that certiorari should be granted in this case because the panel decision of the Sixth Circuit Court of Appeals is contrary to the decisions of the Supreme Court of the United States, and contrary to prior decisions of the United States Court of Appeals for the Sixth Circuit and other circuits, and consideration by this court is necessary to secure and maintain uniformity of decisions.

The decision of the three-judge panel of the United States Court of Appeals for the Sixth Circuit overturning the decision of the United States District Court

for the Eastern District of Kentucky raises a number of issues of substantial importance to the parties and to others similarly situated in this country who need and desire the use of a federal forum in which to litigate their controversies for violations of their constitutional rights. The decision of the United States Court of Appeals for the Sixth Circuit, if allowed to stand, would effectively extinguish a person's ability to seek redress in the federal courts for substantive due process violations.

Moreover, in rendering its' decision, the Court of Appeals has overlooked or misapprehended Kentucky law as it applies to the rights of the plaintiffs in this case.

I. The Supreme Court Has Firmly Established the Plaintiffs' Right to Bring a Claim for a Substantive Due Process Violation in a Section 1983 Action in Federal Court, Without Being Required to Exhaust State Judicial or Administrative Remedies.

The three-judge panel of the Court of Appeals erroneously ruled that the plaintiffs' Section 1983 action in federal court was premature because the plaintiffs failed to file a claim for inverse condemnation in state court prior to filing their Section 1983 action in federal court. (Appendix A, at pages 4a and 5a). The panel cited *Four Seasons Apartment* v. *Mayfield Heights,* 775 F. 2d 150 (6th Cir. 1985), in support of their position. *Four Seasons Apartment* involved a case where the plaintiffs' asserted a claim for taking of property without just compensation and a deprivation of property without *procedural* due process in a

Section 1983 action. The plaintiffs' case here is based on a *substantive* due process violation, not a procedural due process violation and not on a taking of property without just compensation. For this reason, the panel erroneously applied the reasoning of *Four Seasons Apartment* to the facts of this case.

Four Seasons Apartment involved some developers who challenged a city's recision of a building permit as an unconstitutional taking without just compensation. The United States Court of Appeals for the Sixth Circuit held in that case that the developers could not challenge the city's actions without first using state procedures under inverse condemnation. The Court of Appeals panel erroneously applied the same reasoning in this case, stating that if the plaintiffs' believed that the new zoning ordinance deprived them of the use of their property, they should have brought a inverse condemnation proceeding in state court before filing civil rights action in federal court under Section 1983. (Appendix A, at pages 4a and 5a). The three-judge panel of the Court of Appeals ruled that because the plaintiffs failed to avail themselves of available state procedures, the decision of the board of adjustments cannot be considered final, and that the federal suit is premature. By applying such reasoning to the facts of this case, the Court of Appeals panel has overlooked the distinction that in *Four Seasons Apartment,* the plaintiffs' asserted a *procedural* due process claim and a claim for taking of property without just compensation. Here, the claim is based on substantive due process, and the Anderson County zoning authorities

may not deprive the plaintiffs' of their right to complete their project as planned no matter what procedures are employed.

The Supreme Court of the United States has firmly established the right of a person to bring a claim for a substantive due process violation in a Section 1983 action in federal court without being required to exhaust state judicial or administrative remedies. *Patsy* v. *Board of Regents, State of Florida,* 102 S. Ct. 2557 (1982); *Monroe* v. *Pape,* 81 S. Ct. 473 (1961); *Daniels* v. *Williams,* 106 S. Ct. 677 (1986). This right has also been firmly established by the circuit courts of the federal judiciary system, including the Sixth Circuit Court of Appeals. See, *Wilkerson* v. *Johnson,* 699 F. 2d 325 (6th Cir. 1983); *Wilson* v. *Beebe,* 770 F. 2d 578 (6th Cir. 1985); *Fetner* v. *City of Roanoke,* 813 F. 2d 1183 (11th Cir. 1987); *Gilmere* v. *City of Atlanta, Georgia,* 774 F. 2d 1495 (11th Cir. 1985); *Thomas* v. *Texas State Board of Medical Examiners,* 807 F. 2d 453 (5th Cir. 1987); and *Littlefield* v. *City of Afton,* 785 F. 2d 596 (8th Cir. 1986).

Thus, the Court of Appeals has rendered a decision that is completely contrary to the decisions of the Supreme Court and the circuit courts, and which is even inconsistent with and contrary to prior decisions of the Sixth Circuit Court of Appeals. Its decision, if allowed to stand, would deprive all persons in this country of their right to seek redress for substantive due process violations in the federal courts, effectively destroying the obvious legislative intent of 42 USC, Section 1983.

II. A Person Who States a Claim for a Substantive Due Process Violation Under Section 1983 and Who Has Acquired a Vested Right Under Kentucky Law to Complete the Development of His Property Is Not Required to First Seek a Variance From the Application of a Subsequently Enacted Zoning Ordinance Before Filing a Section 1983 Action.

The three-judge panel of the Court of Appeals in this case ruled that the plaintiffs failed to obtain a final decision regarding the application of the zoning ordinance to their property because they did not seek a "variance" which would supposedly allow them to continue their development. (Appendix A, at pages 3a and 4a). The panel recognized that the plaintiffs' asserted a pre-existing use of their property, but nevertheless ruled that because the plaintiffs did not seek a variance from the newly enacted zoning ordinance, their claim was not ripe.

The United States District Court, in an opinion which thoroughly analyzed the application of Kentucky law to the facts of this case, found that the plaintiffs had acquired a vested property right under state law, protected by the Fourteenth Amendment to the Constitution of the United States, to complete development of their property. (Appendix B, *infra.*) By expending substantial sums in furtherance of the development of the property *prior* to the enactment of the zoning ordinance in Anderson County the plaintiffs acquired the right under Kentucky law to complete the project as planned.

It would indeed be illogical under the law to require a person who has acquired a vested right under state

law to complete development of his property to apply for a variance from the application of a subsequently enacted zoning ordinance, when the ordinance does not even apply to his development. It is respectfully submitted that a person who has acquired the right to develop his property is not required to seek a variance from the application of a subsequently enacted zoning ordinance. This is particularly the case when that person has established a lawful, pre-existing use of the property under state law.

The panel of the Sixth Circuit Court of Appeals' faulty reasoning was based on the case of *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 105 S. Ct. 3108 (1985). In *Williamson County*, county-wide zoning existed *prior* to the actions of the predecessor in interest, a land developer, who had obtained approval of a preliminary plat for development of a tract. The Williamson County Regional Planning Commission had approved a preliminary plat for "cluster" development of residential areas. The case involved the application of Tennessee zoning law, not Kentucky zoning law, and at issue was the allowable density of the dwelling units under a 1973 zoning ordinance. In 1977, the county zoning ordinance was amended so as to reduce the allowable density of dwelling units, and in 1979, the zoning commission decided that further development of the tract should be governed by the ordinance and regulations as amended. The plaintiffs, successors in interest to the developer, brought a Section 1983 action against the planning commission in the United States District Court for the

Middle District of Tennessee, alleging a temporary taking of their property in violation of the Just Compensation Clause of the Fifth Amendment. Under Tennessee law, the plaintiffs could have but did not seek a variance from the provisions of the zoning ordinance pertaining to the allowable density of dwelling units. Upon review, the Supreme Court ruled that the plaintiffs' had not obtained a final decision regarding the application of the ordinance and regulations to their property, and further had not utilized the procedures that Tennessee provides for obtaining just compensation. For those reasons, this Court held that the claim was therefore not ripe.

Under the facts of the case at bar, inverse condemnation is clearly an inadequate remedy since that remedy would not compensate the plaintiffs for their lost profits, loss of entitlement to rents and other economic losses they have incurred as a result of the defendants' unauthorized actions. Under Kentucky law, damages in inverse condemnation actions are treated the same as straight condemnation actions by eminent domain under Section 242 of the Kentucky Constitution. *Com., Nat. Resources* v. *Stearns Coal & Lumber,* Ky., 678 S. W. 2d 378 (1984). The measure of damages therefore is limited to the fair-market value of the property at the time of the taking. *Sea* v. *Com., Dept. of Highways,* Ky., 418 S. W. 2d 766 (1967). Enhancement in the value of the property attributable to a proposed improvement is *not* a compensable item of value. *Com., Dept. of Highways* v. *Hendricks,* Ky., 400 S. W. 2d 676 (1966). Moreover, inverse condemna-

tion is only to be considered as an alternative state remedy in cases where a person is asserting a claim for a violation of the "just compensation" clause of the Fifth Amendment, and does not apply to persons seeking redress for violations of their substantive due process rights under the due process clause.

There is clearly no state remedy which can or will protect the plaintiffs' right to complete development of the project under Kentucky law other than their vested right under state law protected by the Fourteenth Amendment. The substantive right to continue the development of their mobile home park free from the retroactive application of a county zoning ordinance is not an appeal from a "taking" since there was never a legal taking. Rather, this was a flagrant misuse of the police power by a local government which used its authority under color of law to stop a project with which it disagreed. The plaintiffs should not be without the remedy intended by the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 USC, Section 1983. The abuse of governmental power demonstrated by this case is exactly the reason why this honorable Court has guaranteed in its past decisions (cited hereinabove) a federal remedy which is available without the exaustion of state remedies.

III. The Three-Judge Panel of the Sixth Circuit Court of Appeals Erred in Finding That the Plaintiffs Could Have Sought a Variance From the Zoning Regulations, Where the Procedure Available for Obtaining a Variance From the Zoning Regulations Under Kentucky Law Only Applied to "Dimensional Variances" and May Not be Used to Effect a Re-Zoning of the Property.

The panel of the Sixth Circuit erroneously ruled that the plaintiffs could have sought a variance from the zoning regulations which supposedly would have allowed them to continue their development. (Appendix A, at pages 3a and 4a). Even the defendants in this case have never suggested that the plaintiffs could have obtained a variance from the zoning regulations. In fact, the defendants insisted that the plaintiffs could develop the mobile home project only upon successfully obtaining a *re-zoning* for that purpose. The board of adjustments also speculated that there was a "good probability that the zoning authorities would consider favorably an *up-zoning* request to a less dense residential development . . .". (Appendix C, page 23a). Thus, the defendants have never suggested that the plaintiffs could have sought a variance from the zoning regulations, but instead insisted that the plaintiffs must look to having the property rezoned in order to complete their development.

It is respectfully submitted that the three-judge panel who decided this case erroneously assumed that the plaintiffs could have sought a variance from the zoning regulations which would have allowed them to continue their development. However, under Ken-

tucky law the only variances which can be granted were, at the time of the board's action, *dimensional variances.* Any attempt by the board to expand upon that power would amount to legislation by it, which is forbidden. *Arrow Transportation Company* v. *Planning and Zoning Commission,* Ky., 299 S. W. 2d 95 (1956). Under KRS 100.111, "dimensional variance" meant "a departure from the terms of the zoning regulations pertaining to height or width of structures and size of yards and open spaces, . . ."

In view of the restriction under Kentucky zoning law as to the limited use of variances, it is apparent that a variance may not be used to in effect "rezone" property.

IV. The Unappealed Decision of the Anderson County Board of Adjustments Constituted a Final and Judicially Reviewable Decision Under Kentucky Law Regarding the Application of the Zoning Ordinance to the Plaintiffs' Development.

The Sixth Circuit ruled that the plaintiffs' Section 1983 action was premature because they had not obtained a final decision regarding the application of the zoning ordinance.

KRS 100.347 provides that any person claiming to be injured or aggrieved by any final action of the zoning commission or board of adjustments may appeal from the action to the circuit court of the county in which the land lies. All decisions which have not been appealed within thirty days are deemed final.

The defendants have argued all along that the plaintiffs could have appealed the decision of the board of

adjustments within thirty (30) days. However, it must be remembered that the board of adjustments found that the plaintiffs' project was a pre-existing, non-conforming use. The board simply chose to artificially create a "Phase 1" of that non-conforming use.

The defendants have admitted that the decision of the board of adjustments was a final decision by stating in their brief before the District Court that "Kentucky gives preclusive effect to final decisions of the board" and attempting to rely on the doctrine of issue preclusion enunciated in *University of Tennessee* v. *Elliott,* 106 S. Ct. 3220 (1986).

Additionally, the law in Kentucky is clear that unless one utilizes the appeal procedure set forth in KRS 100.347 within thirty (30) days, that decision is deemed a final decision. KRS 100.347. In view of the fact that the unappealed decision of the board of adjustments was a *final* decision under Kentucky law, and that variances are restricted to "dimensional variances" under Kentucky law and cannot be utilized to effect a rezoning of property, the decision of the board of adjustments must be considered final. For this reason, plaintiffs' Section 1983 action cannot be considered premature.

CONCLUSION

The effect of the Sixth Circuit's decision is to deny relief from the federal courts to persons who have been denied substantive due process unless those persons have first exhausted their state remedies. This is not

now nor has it been since the enactment of 42 USC, Section 1983 the law. We do not believe that it is this honorable Court's intent to further restrict access to judicial relief where there has been a genuine deprivation of civil rights. Denial of this petition would do just that.

It is submitted that in recent years the area of property rights affected by zoning laws has been one of particular emphasis by the Court. This case should be heard, if for no other reason than to clearly distinguish the remedies available for a "taking" of property as opposed to an oppressive use of the police power.

Kentucky law recognizes the vested property right which is the subject of this case. The board of adjustments, in a final and non-appealable decision, recognized that right as well, although it arbitrarily attempted to limit that right. The District Court for the Eastern District of Kentucky recognized this arbitrary limitation and ruled in favor of the plaintiffs. The Sixth Circuit Court of Appeals has misconstrued the cause of action and unintentionally created new obstacles to federal judicial relief. Certainly, this is not desirable precedent, as it will have far-reaching effects on the rights of all citizens to petition the federal courts for relief from denial of their substantive due process rights.

The petitioners respectfully pray that a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 87-5234

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES T. WEAVER & GERALDINE WEAVER, his wife;
KENTUCKY RIVER DEVELOPMENT CORPORATION; and
C. T. & G., INC., - - - - - *Plaintiffs-Appellants,*

v.

ANDERSON COUNTY FISCAL COURT;
ANDERSON COUNTY PLANNING COMMISSION; and
ANDERSON COUNTY BOARD OF ADJUSTMENTS, - - - - - *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION—Filed February 11, 1988

Decided and Filed: _____

Before: Merritt, Kennedy, and Krupansky, Circuit Judges.

PER CURIAM. Plaintiffs, Charles Weaver, et al., brought this Section 1983 action in the United States District Court for the Eastern District of Kentucky, alleging that the defendants, Anderson County Fiscal Court, et al., deprived plaintiffs of their constitutionally protected right not to be deprived of property without due process of law by ordering him to halt development of a mobile home park because

the property in question had recently been zoned as exclusively residential. The District Court which heard the case on summary judgment, ruled that the plaintiffs had acquired a vested right to complete their development, and further ruled that the decision of the Board of Adjustments denying much of the relief plaintiffs had requested, had no *res judicata* effect in this case. Defendants appealed, claiming, among other things that plaintiffs' suit should be dismissed for lack of ripeness. Because we agree that plaintiffs did not adequately take advantage of available state remedies, we REVERSE the decision of the District Court, and REMAND with instructions to DISMISS the case as prematurely brought.

Plaintiffs are owners of land in Anderson County, Kentucky, that they planned to develop into a mobile home park and an adjacent sales lot. Weaver submitted an application to the state for a permit to construct 340 lots, together with an adjacent sales lot. On March 14, 1985, the State Department of Health issued a permit and the plaintiffs started their development soon thereafter. Plaintiffs claimed to have spent considerable amounts of money and incurred substantial obligations preparing the site for development.

On September 1, 1985, Anderson County adopted its zoning ordinance which zoned plaintiffs' property as agricultural. Since a mobile home park and sales lot violated the new zoning laws, in November of 1985 the zoning enforcement officer of Anderson county issued a cease and desist order against the plaintiffs to prevent any further development in violation of the new laws.

In response to the cease and desist order, the plaintiffs filed this action on December 12, 1985, requesting a preliminary injunction from the District Court enjoining the defendants from interfering with their construction pending a review of the merits of the case. Plaintiffs also filed an appeal of the cease and desist order with the Anderson

County Board of Adjustments, solely for purposes of preserving their right of appeal in the state system and to contest the jurisdiction and legal authority of the Board of Adjustments over the plaintiffs' alleged pre-existing and non-conforming use. That was their sole use of state remedies. Notably, the plaintiffs did not seek a variance to the zoning regulations nor did they bring an inverse condemnation proceeding against the county.

Prior to any hearing before the Board of Adjustments, the District Court granted the injunctive relief requested by the plaintiffs, but advised all parties that it would be appropriate for the Board of Adjustments to hold a hearing and make findings on the matter. The Board then found that the plaintiffs had acquired a vested right to complete only 70 lots of the 340 lot project, (Phase One of the plan), but held that plaintiffs had no vested rights to develop the rest of the land as a mobile home park or sales lot. The plaintiffs did not appeal the Board's ruling to the state circuit court, as they were entitled to do, but instead returned to the District Court and requested permanent injunctive relief. Each side moved for summary judgment, and the District Court granted plaintiffs' summary judgment and the requested injunction.

Defendants argue that plaintiffs' claims lack the ripeness required by the Supreme Court's decision in *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). We agree. In *Williamson County,* the Supreme Court held that the plaintiff's takings and due process claims were premature because they had not applied for a zoning variance before bringing their Section 1983 claim against the county. In that case developers of a clustered homes community sued the Williamson County Planning Commission for changing zoning requirements during development of the project and then refusing to approve plats that allegedly would have

met the requirements of the prior law . The Court rejected the developer's constitutional claims because it had both failed to "seek variances that would have allowed it to develop the property according to its proposed plat," id. at 188, and failed to "seek compensation through the procedures the State has provided for doing so." Id. at 194. Therefore, the Court held, the developer's "claim is not ripe" because it had "not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property." Id. at 186.

The same is true in this case. The plaintiffs have failed to obtain a final decision regarding the application of the zoning ordinance to their property. They have not sought a zoning variance which would allow them to continue. It is not enough that they appealed the cease and desist order to the Board of Appeals, because as the Supreme Court said in *Williamson County*, "the Board was empowered, at most, to review [the cease and desist order], not to participate in the . . . decisionmaking." Id. at 193.

Plaintiffs attempt to distinguish this case from *Williamson County*, arguing that *Williamson County* involved a claim under the just compensation clause, while they also claim a substantive due process violation under the due process clause. This argument fails because the *Williamson County* Court made clear that a litigant must first request a variance, whether alleging a takings or a substantive due process violation. "We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature." Id. at 199.

Aside from plaintiffs' failure to request a variance, their failure to file a claim for inverse condemnation also makes this suit premature. In *Four Seasons Apartment* v. *City of Mayfield Heights*, 775 F. 2d 150 (6th Cir. 1985), this Court held that developers could not challenge a city's recission of

a building permit as an unconstitutional taking without just compensation without first using state procedures under inverse condemnation. Likewise, in this case, if the plaintiffs believed that the new zoning ordinance deprived them of the use of their property, they should have brought an inverse condemnation proceeding before filing suit under Section 1983 Because the plaintiffs have failed to avail themselves of the available state procedures, the County's decision cannot be considered final, and the federal suit is premature. Accordingly we REVERSE the decision of the District Court, and REMAND the case with instructions to DISMISS the complaint without prejudice.

No. 87-5234

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES T. WEAVER, ET AL., - *Plaintiffs-Appellees,*

v.

ANDERSON COUNTY FISCAL COURT, ET AL., - - - - - *Defendants-Appellants*

ORDER—Filed April 16, 1988

BEFORE: MERRITT, KENNEDY and KRUPANSKY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk
John P. Hehman, Clerk

Case No. 87-5234

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES T. WEAVER, et al. - - *Plaintiffs-Appellees, Cross-Appellants,*

v.

ANDERSON COUNTY FISCAL COURT, et al. - - - - - - *Defendants-Appellants, Cross-Appellees*

ORDER—Filed May 4, 1988

BEFORE: MERRITT, KENNEDY and KRUPANSKY, Circuit Judges.

Upon plaintiff's motion to stay the mandate pending application for a writ of certiorari,

It is ORDERED that the motion be and it hereby is GRANTED and the mandate shall be stayed for 30 days.

ENTERED BY ORDER OF THE COURT

(s) Leonard Green
Leonard Green, Chief Deputy

Case No. 87-5234

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES T. WEAVER, ET AL., - - *Plaintiffs-Appellees,*

v.

ANDERSON COUNTY FISCAL COURT,
ET AL., - - - - *Defendants-Appellants.*

ORDER—Filed June 16, 1988

BEFORE: MERRITT, KENNEDY and KRUPANSKY, Circuit Judges.

Upon consideration of the appellee's motion to extend the stay of mandate for an additional 30 days, pending an application for writ of certiorari,

It is ORDERED that the motion be and it hereby is GRANTED and the mandate shall be stayed for an additional 30 days.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 85-102

CHARLES T. WEAVER, ET AL. - - - *Plaintiffs*

v.

ANDERSON COUNTY FISCAL COURT, ET AL. - *Defendants*

OPINION—Filed December 17, 1986

BERTELSMAN, District Judge:

This 42 U.S.C. §1983 action, arising out of a zoning dispute, requires an analysis of the applicability of the rule of *University of Tennessee* v. *Elliott*, ___ U.S. ___, 106 S. Ct. 3220 (1986) to decisions of zoning Boards of Adjustments operating under Kentucky law.

FACTS

Plaintiffs are owners of a tract of land located in both Anderson and Franklin Counties, Kentucky. They had planned to develop this land into a mobile home park and an adjoining sales lot. Plaintiffs moved ahead with their plans and obtained a permit from the state Health Department, which has jurisdiction over mobile home parks. At this time there was no zoning ordinance in effect in Anderson County. By March 1985, substantial expenditures had been made or obligations incurred by plaintiffs in planning the project and securing this permit.

The application to the state was for a mobile home park of 340 lots and a permit was issued for that number in March 1985 in accordance with a surveyed plat submitted with the application. Construction was begun in April 1985, and proceeded without interruption until plaintiffs' financing was jeopardized by efforts of the zoning authorities to stop it. The amount expended or incurred by plaintiffs in furtherance of their project is disputed, but defendants admit to at least $40,000 to date. Actually, the amount is probably well in excess of that sum. Roads and a sewer plant have been constructed and sewer lines laid.

In any event, construction of plaintiffs' project was well under way when Anderson County adopted a zoning ordinance effective September 1, 1985. Shortly thereafter, defendant Searcy, the zoning enforcement official, issued a cease and desist order against plaintiffs prohibiting any further construction on the basis that the use of the land for a mobile home park was in violation of the zoning ordinance, which zoned the land for agricultural uses.

In response to the cease and desist order, plaintiffs filed this action and secured a preliminary injunction from this court enjoining defendants from interfering with plaintiffs' construction pending the court's reaching the merits of the action, which would require a determination of whether plaintiffs had a vested right under Kentucky law to complete their project. The court advised all parties, however, that it would be appropriate for the Anderson County Board of Adjustments to hold a hearing and make findings on this issue, the federal action having been filed prior to any hearing before the Board of Adjustments. *See* KRS Chapter 100.

Subsequently, a trial-type hearing was held in two sessions before the Board of Adjustments. The Board found that plaintiff had acquired a vested right to complete only 70 lots of the project. The Board ruled the project

could be considered in separable phases, of which the 70 lots were deemed "phase 1." The court has carefully reviewed the transcript of these hearings and holds that the Board's findings are totally at variance with the uncontradicted evidence which shows that plaintiffs had proceeded from the beginning to construct the project as a whole and had always treated it as a unit.

Plaintiffs' problem arises, however, from the fact that they did not appeal the ruling of the Board of Adjustments to the state circuit court, as provided by KRS 100.342.

Rather, plaintiffs returned to this court and pursued their quest for permanent injunctive relief on their vested right theory. At that time, the law of this Circuit was that decisions of administrative bodies, unreviewed by a court, were not *res judicata* in subsequent §1983 actions. *Elliott* v. *University of Tennessee,* 766 F. 2d 982 (6th Cir. 1986), rev'd sub. nom. *Elliott* v. *University of Tennessee, supra.*

The Supreme Court of the United States, however, reversed *Elliott* and adopted a contrary view. After the Supreme Court decision, defendants moved for summary judgment in this action on the basis of *res judicata* effect of the decision of the Board of Adjustments.

ANALYSIS

Vested Right

It is clear under Kentucky law that once the plaintiffs had expended substantial sums in furtherance of their mobile home park project prior to the enactment of the zoning ordinance they acquired a property right, vested under Kentucky law, to complete the project as planned. The earliest case recognizing such a right is *Darlington* v. *Board of Councilmen of the City of Frankfort,* 282 Ky. 778, 140 S. W. 2d 392 (1940). In that case the plaintiff landowner had done some rather minor excavating toward con-

verting a residence into a florist shop before the enactment of a zoning ordinance. Kentucky's highest court held that she had the right to complete the construction and operate the shop, although an emergency zoning ordinance freezing construction had been passed in the interim. The court enunciated its holding quite clearly:

> "It would seem, therefore, that the right to utilize one's property for the conduct of a lawful business not inimicable to the health, safety, or morals of the community, becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality, or, in other words becomes 'vested' within the full meaning of that term, when, prior to the enactment of such restrictions, the owner has in good faith substantially entered upon the performance of the series of acts necessary to the accomplishment of the end intended."

140 S. W. 2d at 396.

Darlington has been reaffirmed many times by the Kentucky appellate courts. *Perkins* v. *Joint City-County Planning Commission,* 480 S. W. 2d 166 (Ky. 1972); *Hobbs* v. *Markey,* 398 S. W. 2d 54 (Ky. 1966); *Petty* v. *Barrentine,* 594 S. W. 2d 903 (Ky. App. 1980). *Cf. Higdon* v. *Campbell County Fiscal Court,* 374 S. W. 2d 511 (1964) (expiration of interim ordinance vested right to complete mobile home park). Clearly, the situation before the court here is within the rule espoused by these cases. The record establishes that plaintiffs began construction of their mobile home park and sales lot, which they considered as a single project.[1]

---

[1]Defendants argue that the mobile home park was commenced in violation of local subdivision regulations. In *Higdon* v. *Campbell County Fiscal Court,* 374 S. W. 2d 511 (Ky. 1964), the highest

(Footnote Continued on Next Page)

It was so presented to this court at the preliminary injunction hearing and to the Board of Adjustments at its hearings. It was only as an afterthought that the Board tried to circumvent plaintiffs' vested right by adopting its "phase one" theory. The economic viability of the project depends on the revenues that it will produce as a whole. The fact that plaintiffs considered the project as a single viable unit is indicated by the fact that they secured a permit from the State Health Department for it as a unit six months before the enactment of the zoning ordinance. Under these circumstances it must be considered as one project which the plaintiffs had clearly commenced. *Perkins,* 480 S. W. 2d at 167-8.

This property right existing under state law is protected by the Fourteenth Amendment to the Constitution of the United States. *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Littlefield* v. *City of Afton,* 785 F. 2d 596, 600 (8th Cir. 1986); *Cf. McLaurin* v. *Fischer,* 768 F. 2d 98, 102 (6th Cir. 1985) (citing many cases).

Deprivation of this right is a violation of plaintiffs' substantive due process rights. *Littlefield* v. *City of Afton,* 785 F. 2d at 603-608, citing *Wilkerson* v. *Johnson,* 699 F. 2d 325, 328 (6th Cir. 1983), and numerous other cases.[2]

(Footnote Continued From Preceding Page)

Court of Kentucky held that a mobile home park was not covered by the definition of a subdivision, inasmuch as there was a separate definition of "mobile home park" in KRS Chapter 219. The present statute is KRS 219.320(5). In any event, defendants have abandoned this argument by recognizing the vested right as existing in "phase 1" of the park.

[2]It should be noted that plaintiffs do not claim deprivation of procedural due process. Therefore, they need not plead and prove inadequacy of state remedies. *Littlefield* v. *City of Afton,* 785 F. 2d at 607-608. *Cf. National Communication Systems, Inc.* v. *Michigan Public Service Commission,* 789 F. 2d 370 (6th Cir. 1986),

(Footnote Continued on Next Page)

There is no doubt that the plaintiffs are entitled to summary judgment,[3] unless the unappealed decision of the Board of Adjustments is *res judicata.* We will now turn to that issue.

Res Judicata

As has been stated, late in its 1985-86 term the Supreme Court of the United States decided the case of *University of Tennessee* v. *Elliott,* __ U.S. __, 106 S. Ct. 3220 (1986). There, the Court held that an unappealed decision of a state administrative agency, acting in a judicial capacity and employing fair procedures, was entitled to the same *res*

(Footnote Continued From Preceding Page)

and cases therein cited; *Wilson* v. *Beebe,* 770 F. 2d 578 (6th Cir. 1985). *Four Seasons Apartment* v. *City of Mayfield Heights,* 775 F. 2d 150 (6th Cir. 1985), is not to the contrary because in that decision the plaintiffs asserted a procedural due process claim. Here, the claim is based on substantive due process. Plaintiffs' theory is that the zoning authorities may not deprive them of the right to complete their project as planned no matter what procedures are employed.

[3]Defendants argue that plaintiffs are required to pursue their remedies before the zoning authorities to determine what use of the tract will be allowed. They rely on *Williamson County Regional Planning Commission* v. *Hamilton Bank,* __ U.S. __, 105 S. Ct. 3108 (1985). This reliance is misplaced, however, because that case involved a claim of a taking without just compensation as a result of overstringent zoning. Plaintiffs here assert no claim under the just compensation clause that they have been deprived of all viable economic use of their property. They claim they began *this* project and have a constitutional vested right to complete it, which claim this court here holds to be meritorious. Therefore, *Williamson County,* and similar cases, are not applicable. *Cf. McDonald Sommer & Yates* v. *Yolo County,* 106 S. Ct. 2561 (1986). For the same reason the guidelines for the kind of substantive due process review set forth by this court in *Stratford* v. *State-House, Inc.,* 542 F. Supp. 1008 (E.D. Ky. 1982), are not applicable.

judicata effect in §1983 actions as it would have under state law. There is no doubt the Board of Adjustments here was acting in a judicial capacity in reviewing the cease and desist order issued by the zoning enforcement official. Any defects in the procedures employed were waived by the plaintiffs by participating in the hearings without objection. The question is: what claim or issue preclusive effect would such a decision of a board of adjustments have under Kentucky law?

This court recently had occasion to discuss the *res judicata* effect of the decisions of administrative agencies under Kentucky law. *Barnes* v. *McDowell*, ___ F. Supp. ___ (E.D. Ky. 1986). There, we pointed out that the general rule in Kentucky is to give broad scope to the preclusive effect of administrative decisions. The reader is referred to that opinion for an extensive discussion.

However, the preclusive effect given to the decisions of boards of adjustments is more limited under Kentucky law than that given to those of other agencies. The decision of the Supreme Court of Kentucky in *Greater Cincinnati Marine Service, Inc.* v. *City of Ludlow*, 602 S. W. 2d 427 (Ky. 1980), commands that conclusion, although the opinion is not free of ambiguity. There, a landowner attempted to take an appeal to the state court from a decision of a board of adjustments which had denied a conditional use permit. The appeal was a nullity because of the landowner's failure to make the local planning commission a party. The complaint also contained counts raising constitutional and other legal questions. The court held that the failure properly to perfect an appeal of these issues did not bar the landowner from raising them in the action. Thus a collateral attack was permitted on the decision of the board of adjustments concerning certain issues of law, on the ground that the complaint "was far more than an appeal" from the decision of the board. 602 S. W. 2d at 429.

The decision will bear no other construction but that the decisions of boards of adjustments are not *res judicata* as to issues of law in Kentucky. This is the ineluctable inference from the court's permitting a collateral attack to be made on the board's decision as to such issues. This view is in accord with those decisions that recognize that there is less need for affording preclusive effect to the decisions of administrative agencies on issues of law. *See Barnes* v. *McDowell, supra*, ___ F. Supp. ___, n.5. Boards of adjustments are typically composed of laymen who meet at infrequent intervals to decide such matters as the granting of variances from lot size and side yard restrictions. Although they may have the advice of counsel, they have had less opportunity to gain expertise to pass on complex issues of law than a state agency such as the Kentucky Personnel Board, which was involved in *Barnes, supra.* Also, they may be subject to local pressures. Such considerations as these may have been the unarticulated reason for the decision of the Supreme Court of Kentucky in *Greater Cincinnati Marine Service, supra. Cf. Polk* v. *Yellow Freight System, Inc.*, 801 F. 2d 190 (6th Cir. 1986) (unemployment insurance decision not binding on some matters).

Therefore, the court concludes that the unappealed decision of the Board of Adjustments of Anderson County has no *res judicata* effect in this case.

CONCLUSION

From the above analysis it may be seen that there are no genuine issues of material fact and that plaintiffs are entitled to summary judgment as a matter of law. They began construction of their mobile home park and sales lot project well in advance of the passage of the zoning ordinance. Under the authorities cited in this opinion they acquired a vested right to complete this project. The adverse decision of the Board of Adjustments regarding

this constitutional right is not *res judicata* as to further review by this court under Kentucky law. Therefore, plaintiffs are entitled to summary judgment affording them declaratory and injunctive relief with respect to their right to complete their project without further interference from the Anderson County authorities. Issues of damages remain pending.[4]

Dated this 17th day of December, 1986.

(s) William O. Bertelsman
William O. Bertelsman, Judge

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[4]The court has previously dismissed the individual defendants on their defense of qualified immunity. Due to the complexity of the issues discussed herein, the court concluded that it could not be said that reasonably well informed officials in these defendants' situation should have known they were violating plaintiffs' clearly established constitutional rights. *See Malley* v. *Briggs,* 106 S. Ct. 1092 (1986).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 85-102

CHARLES T. WEAVER, ET AL. - - - - *Plaintiffs*

v.

ANDERSON COUNTY FISCAL COURT, ET AL. - *Defendants*

ORDER AND PERMANENT INJUNCTION—

Filed December 17, 1986

Oral arguments were heard in this matter on November 17, 1986. The plaintiffs were represented by Steven G. Bolton and John E. Pence; Alex F. Talbott represented the Anderson County Board of Adjustments; Arthur Daniel Kelly represented the Anderson County Fiscal Court. For the reasons stated in the Opinion filed concurrently herewith,

IT IS ORDERED AND ADJUDGED as follows:

1. That the motion for summary judgment filed by defendants Anderson County Board of Adjustments and its individual members be, and it is, hereby DENIED;

2. That the motion for summary judgment filed by defendants Anderson County Fiscal Court, its individual members, Zoning Enforcement Officer Thomas Searcy and the Lawrenceburg/Anderson County Planning Commission be, and it is, hereby DENIED;

3. That the motion for partial summary judgment of the plaintiffs be, and it is, hereby GRANTED;

4. That the defendants and all persons in active concert and participation with them are hereby restrained and enjoined from interfering in any way with the plaintiffs' completion and operation of their mobile home park and sales lot, pursuant to the permit obtained from the Commonwealth of Kentucky. The court adjudges and declares that plaintiffs have a vested right under Kentucky law, protected by the Fourteenth Amendment to the Constitution of the United States to complete said project pursuant to said permit; and

5. That the parties shall confer and file a joint status report with their suggestions for resolving the remaining issues and the possibilities of settlement not later than thirty (30) days from the date of this order.

This 17th day of December, 1986.

(s) William O. Bertelsman
William O. Bertelsman, Judge

APPENDIX C

ANDERSON COUNTY BOARD OF ADJUSTMENTS

Filed May 6, 1986
Courthouse, Lawrenceburg, Ky.

THE ATTACHED HERETO MINUTES of the Anderson County Board of Adjustment hearing were approved by the Anderson County Board of Adjustments on Tuesday, March 25, 1986.

By: (s) Andrew Bird
Andrew Bird, Chairman

cc: Dan Kelly
Steve Bolton, Certified Mail.

APPENDIX C

MINUTES

ANDERSON COUNTY BOARD OF ADJUSTMENT

Wednesday, March 19, 1986

APPEAL OF CHARLES WEAVER, et al.

At 7:10 p.m. in the Anderson County Courthouse the Board of Adjustment convened for the purpose of hearing the appeal of Charles Weaver from a Cease and Desist Order issued by the County Zoning Enforcement Officer, Tom Searcy. The meeting constituted a continuation of the hearing which was begun February 20, 1986 concerning the same appeal. All board members were present. Also present were the Board's attorney, Alex F. Talbott, Tom Searcy's attorney, A. Dan Kelly, and Appellants' attorneys, Steven G. Bolten and his associate.

The Chairman opened the meeting and the Board received and reviewed evidence and heard arguments from the attorneys. With the agreement of the attorneys, the Board went into closed session to conduct its deliberations and, following due deliberation, reconvened in open session and unanimously adopted the following resolution.

WHEREAS, the property of the Appellant, Charles Weaver, and of the corporations owned and controlled by him, Appellants Kentucky River Development Corporation and C. G. & T., Inc., is zoned for agricultural purposes, a district which does not allow the development of a mobile home park or a mobile home sales lot, and

WHEREAS, said zoning has been in effect since September 1, 1985 as a result of a public hearing of the Planning Commission in July, 1985 an action of the Fiscal Court in August, 1985 adopting county-wide zoning for the first time, which county-wide zoning had been discussed for several years and which discussions and action were given some impetus by the growth that would develop from the anticipated General Motors' Saturn Plant as well as the

Appellants' possible mobile home park or other residential developments, and

WHEREAS, subsequent to September 1 and at the time of the issuance of the Cease Order the Appellants were openly taking action in pursuance of the plan to develop a mobile home park in apparent violation of the County Zoning Ordinance, and

WHEREAS, the public interest is significantly involved because mobile home parks have a large number of school age children and this one particularly, would be a bedroom community of Frankfort and Lexington so that its residents would pay a small amount of tax to Anderson County in the form of property taxes and occupational taxes, while creating a disproportionate need for county service due to the number of school children and their distance from schools and the sources of other county services, and this is contrary to good planning which requires that such dense residential developments be located in close proximity to schools and other sources of county services, and

WHEREAS, state law prohibits this Board from allowing the expansion of a nonconforming use, and

WHEREAS, everyone in the county must abide by the zoning laws and the procedures established thereby so that exceptions claimed as a result of an alleged preexisting use should be fairly applied but carefully scrutinized, and

WHEREAS, the Appellants claim a nonconforming use for two separate developments, (1) a mobile park and (2) a mobile home sales lot, both of which they say preexisted the enactment of the county-wide zoning ordinance on September 1, 1985, even though there has never been a mobile home leased or sold on either tract, and

WHEREAS, with respect to the mobile home park, Mr. Weaver had no intention to develop, presently, beyond Phase 1 constituting seventy lots primarily in Franklin County and at the time of the enactment of the zoning ordi-

nance had made no substantial expenditures or taken any substantial actions in pursuance of development beyond Phase 1 even though he did regrade the five year old dirt road which provided rear access to Phase 1, and

WHEREAS, substantially all expenditures and approvals from governmental agencies were for development in Phase 1, such expenditures amounting to approximately $40,000 and such approval being the approval of the Division of Water for the sewer and water lines in Phase 1, and the oral assurance of someone who may have had the authority on behalf of State government to approve construction in Phase 1 but excluding Planning Commission approval of a subdivision plat which the subdivision regulations, if valid, clearly require prior to lease or development of mobile home lots, and

WHEREAS, that portion of the alleged mobile home park beyond Phase 1, which on September 1, 1985 was tentatively planned for future development if Phase 1 had been successful, has substantial economic value even without a mobile home park because of the good probability that the zoning authorities would consider favorably an up-zoning request to a less dense residential development in view of the revelation of the private deed of restriction against agricultural use and the regrading of the old dirt road, and

WHEREAS, many of the expenditures in pursuance of the plans for the mobile home park and the mobile home sales lot were rushed for the direct purpose of establishing an appearance of a valid nonconforming use, and

WHEREAS, with respect to the mobile home sales lot allegedly consisting of seventeen acres, there had been no good-faith, substantial, nonrecoverable investment or action made in pursuance of such development before September 1, 1985; the mobile home sales office, which was delivered after September 1, 1985, and which may have been ordered before September 1, 1985, being readily useable for

other legitimate purposes in this or in other locations,

Now, therefore, be it

RESOLVED that the Cease and Desist Order issued to the Appellants is determined to be invalid as to the lots in Phase 1 based upon the evidence received and demonstrating an existing nonconforming use as to that development, and

FURTHER RESOLVED that the Cease and Desist issued to the Appellants is affirmed as to the remainder of the land located in Anderson County.

(s) Norma Dennis
Secretary

Approved:

(s) Andrew Bird
Chairman

PROOF OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were sent, postage prepaid, to each of the following counsels of record on this 28th day of July, 1988.

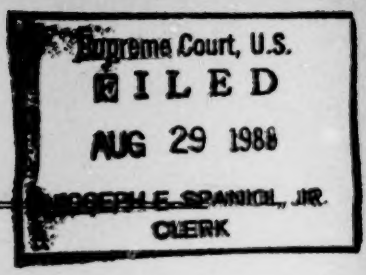
Mr. Arthur Daniel Kelley
106 Cross Main Street
P. O. Box 229
Springfield, Kentucky 40609

Mr. Alex F. Talbott
200 Old Portland Building
Sixth and Market Streets
Louisville, Kentucky 40202

(s) Steven G. Bolton
Steven G. Bolton

(2)

No. 88-194



In The

Supreme Court of the United States

October Term, 1988

CHARLES T. WEAVER, GERALDINE WEAVER, KENTUCKY RIVER DEVELOPMENT CORPORATION, and C.T.&G., INC.

Petitioners,

v.

ANDERSON COUNTY FISCAL COURT, ANDERSON COUNTY PLANNING AND ZONING COMMISSION, and ANDERSON COUNTY BOARD OF ADJUSTMENTS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 88-194

In The

Supreme Court of the United States

October Term, 1988

CHARLES T. WEAVER, GERALDINE WEAVER, KENTUCKY RIVER DEVELOPMENT CORPORATION, and C.T.&G., INC.

Petitioners,

v.

ANDERSON COUNTY FISCAL COURT, ANDERSON COUNTY PLANNING AND ZONING COMMISSION, and ANDERSON COUNTY BOARD OF ADJUSTMENTS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

COUNTERSTATEMENT OF THE CASE

The Respondents do not agree with Weaver's statement of the case. This case has been briefed many times in the District Court and the Court of Appeals and each

time, as now, the facts are a major source of disagreement.

The District Court's Opinion recites many of the erroneous facts initially espoused by the Weavers, but upon a Motion to Amend the District Court conceded that the findings were improper on the Summary Judgment.

In the Court of Appeals, these factual disputes were made known to the Court and the Court of Appeals Opinion deletes any reference to the factual errors found in the initial District Court Opinion. Despite that, the Weavers again in their Petition for Certiorari present an erroneous recitation of the facts.

Although there was no trial in this case, there was a lengthy and complex record created in the District Court. That record contains a complete record of all of the administrative proceedings as well as lengthy pleadings, discovery and affidavits submitted at the District Court level.

The difficulty the Court may have in attempting to resolve this fundamental disagreement of the basic facts is a major reason for denying the Petition for Certiorari. Although a thorough review of the record will clearly establish that the facts are as the Anderson County agencies declare them to be, the difficulty of performing that review in order to begin the consideration of the legal issues presents a major reason for denying the Petition.

In any case, the facts leading to this dispute are as follows:

In the spring of 1985, Weaver presented to certain governmental agencies blueprint drawings showing the division of his 100-acre tract into 340 sites for mobile homes. His tract of land was located on the outskirts of Anderson County and, when developed, would function as a suburb of Frankfort and Lexington, two larger cities located in adjoining counties. Weaver also owned an adjoining 17-acre tract which was not shown on any blueprint. His subsequent testimony, unsubstantiated by any written contemporary documentation, was that he intended to develop this tract as a mobile home sales lot.

The plans for the mobile home park showed only 70 lots in what Weaver himself described as "Phase 1". Only lots in Phase 1 were shown to have the required water, sewers and other utilities. Phase 1 was laid out so that it could function as a self-contained and complete unit. The Board determined on the basis of ample evidence that Weaver had no present intention of developing beyond Phase 1 and that Phase 1 was an economically viable unit, so that its profitability did not depend upon development of the subsequent phases. Weaver had no intention of developing the other sections, unless Phase 1 proved to be financially successful.

There was never any governmental approval for construction of the entire 340-unit development. Plumbing hookups for the first phase were approved by the division of plumbing. A permit purportedly issued by the Department of Health was presented in evidence by Weaver, but it was discovered to have been backdated and signed by a person who had no authority to sign it. No blueprints, drawings or plans reflecting the sales lot on the separate 17-acre tract were ever presented to any

governmental agency for approval, nor were any such plans ever drawn up.

During this same period, General Motors was looking for a location for its proposed new Saturn plant. Anderson County was hopeful that the plant would locate in Anderson County and in anticipation of that, hearings were held in the summer of 1985 on the implementation of county-wide zoning. The new zoning ordinance was enacted on September 1, 1985.

At that date Weaver had spent a substantial sum pursuing the construction of Phase 1, the 70-unit section of the development. However, at that date there were no mobile homes located anywhere on the property and none of the sites were ready to accept such residential units. In addition, no mobile homes were located on the separate 17-acre tract, although one mobile home may have been ordered for the purpose of serving as a sales office.

Kentucky law requires zoning regulations to be applied uniformly throughout the jurisdiction. Everyone in Anderson County was required to abide by the zoning laws and the procedures established thereby unless exempted as a pre-existing use. Expansion of pre-existing uses is prohibited. Claims of exemption as a result of pre-existing uses must be carefully scrutinized by the Anderson County Board of Adjustments.

This proposed mobile home park would have a significant effect upon the public interest in Anderson County. If fully developed, it would house relatively large numbers of school-age children who would require a significant amount of busing to get them to and from

schools located a substantial distance away. Also, because this would be a bedroom community of larger cities located in other counties, tax revenues to Anderson County from the development would be disproportionately small. The proposed development was contrary to good land use planning which would require such dense residential developments to be located in close proximity to schools and other sources of county services.

Kentucky law provides a procedure for any landowner whose proposed use is prohibited by the applicable zoning district to seek rezoning to a different district which would allow his proposed use. Weaver never sought rezoning for any of his property. However, there was a good probability that rezoning of the area beyond Phase 1 would have been favorably considered by the zoning authorities. Because of this, application of the zoning regulations to Weaver's property except for the 70-unit in Phase 1, did not deprive that property of all economic value, and, in fact, it had a substantial amount of economic value even with the application of zoning.

On the basis of these factors, the Board determined that Weaver's claim for an exemption from zoning regulations as a grandfathered pre-existing use was valid only for Phase 1 and that the remainder of his property would be subject to the zoning regulations and procedures that were applicable to all other land in Anderson County.

Kentucky law provides for an appeal through the state court system from any decision of the Anderson County Board of Adjustments. It also provides for an action for inverse condemnation if there is found to exist a "taking of property without just compensation." The

appeal and the inverse condemnation action could be pursued in state Circuit Court simultaneously.

These facts are in accord with the findings of the Anderson County Board of Adjustments and they are supported by substantial evidence contained in an ample record created by the trial-type proceedings that occurred before the Anderson County Board.

Kentucky law gives preclusive effect to the findings of the Anderson County Board of Adjustments in absence of an appeal taken from that decision. Weaver took no appeal from that decision and the Board's findings preclude any State court from entertaining contrary factual or legal representations. However, the preclusive effect of the Board's decision is contrary to the District Court's Opinion and the Court of Appeals did not rule on this issue.

Because of the danger that the Court might be misled by some of the erroneous factual statements made in the District Court's Opinion, it is worth repeating that at the hearing on the Motion to Amend and Vacate the Judgment, the District Court conceded that many of the facts recited in its Opinion were not appropriate for Summary Judgment. The following is a list of matters that are contrary to the District Court's Opinion but are nevertheless required to be considered in the Respondent's favor because of the posture of this review.

1. The Plaintiffs did not obtain a permit from the State Health Department prior to the adoption of the zoning regulations on September 1, 1985.

2. No governmental agency has ever approved construction of the entire 340-lot development or the 17-acre commercial sales lot.

3. The Plaintiff's financing was not jeopardized by the efforts of the zoning authorities.

4. The roads and sewer plan had not been constructed September 1, 1985.

5. Weaver had not proceeded from the beginning to construct to 340-unit mobile home park and the 17-acre commercial sales lot as a whole, but rather had planned to proceed with the construction in phases with each subsequent phase being dependent upon the success of the prior one.

6. The commercial sales lot is not reflected on any drawings related to the development of the mobile home development and the two projects were conceived separately and, though complementary, were not entirely dependent upon one another.

7. Phase 1 of the project was an economically viable unit.

8. The Board did not waive the subdivision regulations for any of the project beyond Phase 1, the 70-lot section.

SUMMARY OF ARGUMENT

This is a land use regulation dispute. Weaver began developing a mobile home park about the same time Anderson County Fiscal Court passed its new zoning

ordinance. Weaver claimed to be grandfathered so as to be exempt from the zoning ordinance. The Anderson County Board of Adjustment determined that only a portion of the mobile home park was grandfathered, so Weaver pursued a claim for a Civil Rights violation.

Weaver now concedes that because post-deprivation remedies exist under state law and because he could have sought rezoning under the administrative process, he has no claim for a "taking of property", *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). However, while conceding he has no "taking of property" claim, Weaver says he was "deprived of property without substantive due process of law."

The Court of Appeals held that the Supreme Court's pronouncements in *Williamson County* also precluded Weaver from making a valid claim for a violation of substantive due process. Weaver's Petition for Certiorari attempts to draw (without clearly articulating) some sort of esoteric distinction between a taking claim under the Fifth Amendment and a deprivation of property claim under the Fourteenth Amendment. As the Sixth Circuit determined, the Supreme Court has already ruled in *Williamson County* that considerations of post-deprivation remedies and ripeness apply to the situation regardless of the name given to the claim. The Petition for Certiorari presents no justification for asking this Court to reverse the position it so recently and so clearly took in *Williamson County*.

The Respondents are the local governmental officials who have been sued by Weaver for trying to administer

the local zoning regulations. These Respondents request that the Petition for Certiorari be denied.

ARGUMENT OF LEGAL ISSUES

While many of the facts related in this Response are important to demonstrate the good faith and fairness of the decision of the Anderson County Board of Adjustments, they are not necessary to sustain the decision of the Sixth Circuit Court of Appeals requiring a dismissal of this action. The Sixth Circuit's decision is compelled by this Supreme Court's pronouncements in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 S.Ct. 3108, 87 L.Ed.2d 126 (1985). That case discusses at length two critical elements that are involved in this action: both relate to "ripeness"; one concerns the availability of administrative procedures which could negate or ameliorate the restrictiveness of the existing regulations and the other concerns the existence of "post-deprivation remedies" for compensation under State law.

The Sixth Circuit found that Weaver's cause of action was not ripe because he had available to him administrative remedies which could provide all or partial relief from the restrictions imposed by the existing zoning. The administrative remedy would be in the form of an application by Weaver for rezoning pursuant to KRS 100.211, the statute which sets up this routine, administrative procedure. The standards for determining whether a rezoning application should be approved are set out in KRS 100.213, which requires conformance to the community's comprehensive plan or good justification for not

conforming to the comprehensive plan. The decision of the Anderson County Board of Adjustments notes that there is good probability that such an application would be favorably considered by the zoning authorities. Until such an application is attempted and acted upon by the zoning authorities, there is no way of determining the impact that the Anderson County Zoning Regulations have on Weaver's property.

In *Williamson County* the developer had obtained approval of a preliminary plat for a large residential development. Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for a golf course and began building roads and installing utility lines for the project at a cost of more than $3.5 million.

During the course of the development the local zoning regulations were amended, decreasing the allowable density for residential developments. The developer filed suit in Federal Court claiming that he should not have been subjected to the new standards because he had obtained preliminary approval of the entire development under the old standards.

The Court in *Williamson County* held that the developer had not established any present harm protected by the Constitution because he had not applied to the zoning officials for a final decision establishing the full extent of his rights under the new regulations. In *Williamson County*, the administrative procedures for relief were referred to as "variances".

Weaver attempts to make a mountain out of the fact that the Court of Appeals referred to the administrative

relief as a "variance" and that Kentucky law narrowly defines the term "variance" so that this relief under Kentucky law would not provide Weaver with any significant remedy. Weaver's argument is a mere molehill. The Sixth Circuit was not using the term "variance" to refer to the Kentucky procedure. Rather, it was using the term in the generic sense that is suggested by the *Williamson County* decision to refer to any administrative relief from the existing restrictions. The administrative relief is clearly available to Weaver under KRS 100.211, but thus far he has failed to pursue it.

This is not a requirement that administrative remedies be exhausted, rather it is an essential element in clearly determining the impact of the regulatory scheme upon Weaver's property. *Williamson County, supra,* 105 S.Ct. 3120.

Weaver argues that considerations of ripeness only apply to a "taking" case. He says they do not apply to a "substantive due process" case. This position is clearly contradicted by the language of the Supreme Court in *Williamson County,* where the Court states:

> "Even if viewed as a question of due process, the Respondent's (property owner's) claim is premature." 105 S.Ct. 3108, 3123.

In analyzing the developer's "substantive due process" claim under Section 1983, the Court in *Williamson County* noted that the critical question is whether the regulations "go too far." It went on to say:

> "As we have noted, resolution of that question depends, in significant part, upon the analysis of the effect of the commission's application of the zoning ordinance and the subdivision regulations on the

> value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its Section 1983 action, because respondent failed to apply for variances from the regulations."

It is clear from the above that what the Court is concerned with is the impact of the regulatory scheme upon the investment-backed expectations relating to Weaver's property. That impact cannot be determined until Weaver has pursued the administrative procedures provided for changing the zoning. As the Board noted there is a good probability that such change request would be approved. It cannot be determined what, if anything, Weaver has been deprived of without "substantive due process" until the available administrative procedures have been pursued and acted upon as allowed by the regulatory scheme.

The Court of Appeals also determined that the action must be dismissed because state law provides Weaver with adequate post-deprivation remedy of inverse condemnation.

In *Williamson County* the Court noted that

> "A second reason the taking claim is not ripe is that the respondent did not seek compensation through the procedures the state provided for doing so.
>
> * * *
>
> If the state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." p. 105 S.Ct. 3121.

Further, at footnote 13 the Court states:

> "The nature of the constitutional right therefore requires that a property owner utilize the procedure for obtaining compensation before bringing a 1983 action".

Weaver has not pleaded, proved or even argued the inadequacy of Kentucky's inverse condemnation remedy prior to this time. Nevertheless, *Williamson County* makes clear that the inadequacy can only be demonstrated by the attempt to utilize it and having compensation denied. Having failed to even attempt to utilize the remedy of inverse condemnation, Weaver cannot be heard to argue its inadequacy to fully compensate for any alleged deprivation of property.

Although the Court's pronouncements in *Williamson County* relating to post-deprivation remedies are most specifically made in connection with its analysis of the "taking" claim, the Court subsequently equates the taking claim with the substantive due process claim. The regulation of property creates a substantive due process claim if the regulation "goes too far". This is precisely the same way a "taking" is defined in the leading case of *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). There, the Court said:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 415, 43 S.Ct. 160.

In *Williamson County*, the term "too far" is defined for purposes of substantive due process as follows:

> "The point at which regulation becomes so onerous that it has the same effect as an appropriation of property through eminent domain or physical possession."

Consequently, as regards restrictions imposed on property, the *Williamson County* case effectively equates the taking claims with the substantive due process claims.

CONCLUSION

As compelled by *Williamson County*, the Sixth Circuit determined that Weaver's claims were premature, not ripe. Under State law Weaver may seek rezoning and he may seek inverse condemnation if, after the rezoning procedures, the restrictions still go too far. However, he has no claim for a Civil Rights violation until he has pursued those procedures provided for by Kentucky law and until those procedures have been found to be inadequate. All of this is very clear from a close reading of the *Williamson County* case and there is no reason to grant certiorari in this action simply to restate what has already been said in *Williamson County*. The Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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